

1 Ryan G. Baker (Bar No. 214036)
rbaker@bakermarquart.com
2 Scott M. Malzahn (Bar No. 229204)
3 smalzahn@bakermarquart.com
BAKER MARQUART LLP
4 10990 Wilshire Blvd., Fourth Floor
5 Los Angeles, California 90024
6 Telephone: (424) 652-7800
Facsimile: (424) 652-7850

7 Attorneys for Defendants and
8 Counterclaimants

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11 FOX TELEVISION STATIONS, INC.,
12 TWENTIETH CENTURY FOX FILM
13 CORPORATION, and FOX
BROADCASTING COMPANY, INC.,

14 Plaintiffs,

15 vs.

16 FILMON X, LLC, ALKIVIADES
17 "ALKI" DAVID, FILMON.TV
18 NETWORKS, INC., FILMON.TV,
19 INC., FILMON.COM, INC. and DOES
1 through 3, inclusive,

20 Defendants.

CASE NO. CV12-06921-GW (JCx)

Consolidated with Case No. CV12-
6950-GW(JCx)

**DEFENDANTS' MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT OF SUMMARY
ADJUDICATION OF
DEFENDANTS' COUNTERCLAIM
FOR DECLARATORY RELIEF
AND DEFENDANTS' SECTION 111
AFFIRMATIVE DEFENSE**

[Filed concurrently with Notice of
Motion; Separate Statement; Request
for Judicial Notice; Declarations of
Alkiviades David, Mykola Kutovyy, Dr.
Sigurd Meldal, Kim Hurwitz and Kelly
Raney; Motion to Seal; Notice of
Lodging; and [Proposed] Orders]

Judge: Hon. George H. Wu
Courtroom 10
Hearing Date: July 16, 2015
Time: 8:30 a.m

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	PROCEDURAL HISTORY.....	3
III.	STATEMENT OF FACTS.....	4
	A. The Plaintiffs’ Over-The-Air Programming.....	4
	B. FilmOn X’s Service.....	4
	C. FilmOn X’s Facilities And Technology.....	5
	D. FilmOn X’s Preparations To Recommence Retransmissions.....	7
	E. FilmOn X’s Statements of Account And Royalty Payments.....	8
	F. The Notice of Proposed Rulemaking Issued By The Federal Communications Commission.....	9
IV.	LEGAL BACKGROUND: THE 1976 AMENDMENTS TO THE COPYRIGHT ACT.....	11
V.	ARGUMENT.....	12
	A. FilmOn X Meets The Statutory Definition Of A “Cable System” Under The Copyright Act.....	12
	1. A Section 111(f) “Cable System” Plainly Includes Internet-Based Retransmission Services.....	13
	2. The Supreme Court’s <i>Aereo</i> Reasoning Should Guide This Court’s Analysis.....	15
	3. Legislative History Confirms Congress Intended A Broad and Technology Agnostic Interpretation of Section 111.....	17
	4. <i>Ivi</i> Is Not Controlling And Was Wrongly Decided, In Any Event.....	18
	a. <i>Ivi</i> Is Not Binding On This Court, And <i>Aereo</i> Casts Its Validity Into Doubt.....	18
	b. The Second Circuit Placed Undue Weight On Copyright Office Statements And Policy Recommendations.....	19

1	B. FilmOn X Meets All The Other Statutory Requirements For A Section	
2	111 License.....	22
3	1. FilmOn X Has Made Royalty Payments And Has Otherwise..	22
4	Complied In Good Faith With Subsection (d).....	22
5	2. FilmOn X's Transmissions Were, And Are, "Permissible" Under FCC	
6	Rules And Regulations.....	23
7	a. FilmOn X's Secondary Transmissions Are "Permissible" So	
8	Long As They Are Not Prohibited By The FCC.....	23
9	b. FilmOn X Is Prepared To Comply With FCC Rules And	
10	Regulations.....	24
11	VI. CONCLUSION.....	25

TABLE OF AUTHORITIES

Federal Cases	Page(s)
<i>American Broadcasting Companies, Inc. v. Aereo, Inc.</i> , 134 S.Ct. 2498 (2014).....	passim
<i>Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.</i> , 836 F.2d 599 (D.C. Cir. 1988).....	12
<i>Capital Cities Cable, Inc. v. Crisp</i> , 467 U.S. 691 (1984).....	12
<i>Cartoon Network LP, LLLP v. CSC Holdings, Inc.</i> , 536 F. 3d 121 (2d Cir. 2008).....	19
<i>Chevron, U.S.A., Inc. v. NRDC, Inc.</i> , 467 U.S. 837 (1984).....	20
<i>Children’s Hosp. & Health Ctr. v. Belshe</i> , 188 F.3d 1090 (9th Cir. 1999)	13
<i>Christensen v. Harris County</i> , 529 U.S. 576 (2000).....	21
<i>Connecticut Nat’l Bank v. Germain</i> , 503 U.S. 249 (1992).....	13
<i>Ecological Rights Found. v. Pac. Gas & Elec. Co.</i> , 713 F.3d 502 (9th Cir. 2013)	24
<i>Est. of Cowart v. Nicklos Drilling Co.</i> , 505 U.S. 469 (1992).....	12, 20
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968).....	11
<i>Fox Television Stations, Inc. v. FilmOn X, LLC</i> , CV12-6921-GW (C.D. Cal., filed Aug. 13, 2012)	2
<i>Hubbard Broad., Inc. v. S. Satellite Sys., Inc.</i> , 593 F. Supp. 808 (D. Minn. 1984).....	12

1	<i>In re Sky Angel,</i>	
2	25 FCC Rcd. 3879 (Media Bur. 2010).....	23
3	<i>Kilby v. CVS Pharm., Inc.,</i>	
4	739 F.3d 1192 (9th Cir 2013.)	13
5	<i>Miller v. Gammie,</i>	
6	335 F.3d 889 (9th Cir. 2003)	19
7	<i>Nat'l Broad. Co. v. Copyright Royalty Tribunal,</i>	
8	848 F.2d 1289 (D.C. Cir. 1988).....	12
9	<i>Nat'l Broad. Co., Inc.</i>	
10	940 F.2d 1468 (11th Cir. 1991)	24
11	<i>NBCUniversal Media, LLC v. FilmOn X, LLC,</i>	
12	CV12-06950-GW (C.D. Cal., filed Aug. 13, 2012)	2
13	<i>Padash v. I.N.S.,</i>	
14	358 F.3d 1161 (9th Cir. 2004)	13
15	<i>Satellite Broad. & Commc'ns Ass'n of Am. v. Oman,</i>	
16	17 F.3d 344 (11th Cir. 2011).....	24
17	<i>Skidmore v. Swift & Co.,</i>	
18	323 U.S. 134.....	21
19	<i>Teleprompter Corp. v. Columbia Broad. Sys., Inc.,</i>	
20	415 U.S. 394 (1974).....	11
21	<i>U.S. v. Ron Pair Enterprises, Inc.,</i>	
22	489 U.S. 235 (1989).....	13
23	<i>United States v. James,</i>	
24	712 F.3d 79 (2d Cir. 2013).....	19
25	<i>United States v. Mead Corp.,</i>	
26	533 U.S. 218 (2001).....	20
27	<i>Ventura Broad. Co. v. FCC,</i>	
28	765 F.2d 184 (D.C. Cir. 1985).....	24
	<i>WGN Continental Broadcasting v. United Video, Inc.,</i>	
	693 F.2d 622 (7th Cir. 1982)	14

1	17U.S.C. § 111.....	<i>passim</i>
2	17 U.S.C. § 111(c)(1).....	22, 23, 24
3	17 U.S.C. § 111(d)(1).....	23
4	17U.S.C. § 111(f).....	13, 17, 19, 20
5	17 U.S.C. § 111(f)(3)	14

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

FilmOn X, LLC (“FilmOn X”) seeks to provide the American public access to over-the-air television programming on any computer or mobile device. Congress recognized the importance of such access when it enacted the compulsory copyright license regime to “set[] out the conditions, including the payment of compulsory fees, under which cable systems may retransmit broadcasts.” *American Broadcasting Companies, Inc. v. Aereo, Inc.* (“*Aereo*”), 134 S.Ct. 2498, 2501 (2014). To obtain its license, FilmOn X tendered statements of account to the U.S. Copyright Office, along with the payment of the mandatory license fees. However, the Copyright Office has not processed or refused those filings; rather, because “FilmOn X has raised the [compulsory license] issue before the courts . . . the Office . . . accept[ed] them on a provisional basis.” (SOF 49-51.) It now falls upon this Court to determine whether or not the Copyright Office should process FilmOn X’s filings – and whether or not the American public may experience better access to free, over-the-air television signals retransmitted by companies like FilmOn X, which satisfy all statutory compulsory license requirements.

To qualify as a “cable system” under Section 111, FilmOn X must establish:

- It has one or more facilities located in any state in the United States;
- its facilities receive signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC;
- the facilities make secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to paying members of the public;
- compliance with the procedures set forth in Section 111(d), including submission of Account Statements, along with payment; and
- its transmissions are permissible under FCC rules and regulations.

1 Because FilmOn X satisfies each of these requirements, this Court should find that
2 FilmOn X is entitled to a Section 111 compulsory license.

3 Previously, FilmOn X, along with Aereo, Inc., litigated the public performance
4 right. Throughout the course of that litigation, the Networks¹ argued a **technology**
5 **agnostic** interpretation of the Copyright Act. For instance, in moving this Court for a
6 preliminary injunction, the Fox Plaintiffs argued:

7 the Copyright Act is expressly technology agnostic and prohibits the
8 public performance of a work by a transmission to the public “by
9 means of any device or process.” 17 U.S.C. § 101. In other words,
10 Congress intended that a service such as Aereokiller’s that makes
11 Plaintiffs’ copyrighted works available to its subscribers must have a
license irrespective of any technological gimmickry to deliver the
programming to its subscribers.

12 (Fox Dkt. 41-1 at 2.) On appeal to the Ninth Circuit, the NBC Plaintiffs argued,
13 “[j]ust like cable systems and satellite carriers, Aereokiller retransmits broadcasts of
14 copyrighted television programs to numerous subscribers on a live, real-time basis.”
15 (NBC Dkt. 45 at 4-5.) Further, in ruling on the public performance issue, the
16 Supreme Court focused on the “nature of the service” as opposed to “the
17 technological manner in which [Aereo] provides the service.” *Aereo*, 134 S.Ct. at
18 2511. The Court found Aereo’s system – the same as FilmOn X’s system in all
19 relevant respects – was “for all practical purposes a traditional cable system.” *Id.* at
20 2507. The Court then noted that cable companies have a right to publicly perform
21 copyrighted works under the “compulsory licensing scheme” established in Section
22 111. *Id.* at 2506. These were arguments advanced by FilmOn X in its *amicus* brief,
23

24 ¹ The term “Networks” refers to the Fox plaintiffs in the lead action captioned
25 *Fox Television Stations, Inc. v. FilmOn X, LLC*, CV12-6921-GW (C.D. Cal., filed
26 Aug. 13, 2012) (hereinafter, the “Fox Dkt.”), and the NBC plaintiffs in the
27 consolidated action captioned *NBCUniversal Media, LLC v. FilmOn X, LLC*,
CV12-06950-GW (C.D. Cal., filed Aug. 13, 2012) (hereinafter, the “NBC Dkt.”).

1 filed with the Court. (Raney Decl., Ex. N.)

2 FilmOn X fits squarely within the definitional parameters of a Section 111
3 cable company. Based on the Networks' prior "technology agnostic" interpretation
4 of the Copyright Act, it would appear that they should agree. But the Networks now
5 argue the opposite point – that Section 111 should be interpreted to only apply to
6 cable systems using technologies that have been used in the past to retransmit video
7 programming. Such an inconsistent reading of the Copyright Act does not withstand
8 the slightest scrutiny. Moreover, the Networks' shifting arguments are inherently
9 unfair and extremely restrictive of the public's right to access free-to-air broadcast
10 content by "any device or process." The Court should construe the Copyright Act in
11 a consistent, technologically agnostic manner. Under such an interpretation, FilmOn
12 X qualifies for a compulsory license. Because FilmOn X meets each of the "cable
13 system" criteria enumerated in Section 111, this Court should find that FilmOn X
14 qualifies for the Section 111 compulsory license. The Court should grant
15 Defendants' motion in its entirety.

16 **II. PROCEDURAL HISTORY**

17 The Networks filed these consolidated actions for copyright infringement in
18 August 2012. Since then, the litigation has focused on two legal issues: (1) whether
19 FilmOn X² engages in "public performances" within the meaning of the Copyright
20 Act, and, if so, (2) whether FilmOn X is entitled to a statutory copyright license
21 under section 111 of the Copyright Act.

22 On December 27, 2012, this Court granted a preliminary injunction based on
23 its finding that the Networks had shown a likelihood of success on whether FilmOn
24 X engages in public performances of copyrighted works. (Fox Dkt. 78.) Following

25
26 ² The term "FilmOn X" refers to defendants and counterclaimants FilmOn X,
27 LLC, FilmOn.TV, Inc., FilmOn.TV Networks, Inc., FilmOn.com, Inc. and
28 Alkiviades David.

1 the Supreme Court's *Aereo* decision, FilmOn X amended its pleadings to assert a
 2 new affirmative defense and counterclaim for declaratory relief based on Section
 3 111. FilmOn X seeks "[a] judicial declaration that recognizes [it's] right to a
 4 compulsory [copyright] license in accordance with Section 111," which "would
 5 allow FilmOn X to resume secondary transmissions of plaintiffs' broadcasts without
 6 infringing [Plaintiffs'] copyrights." (Fox Dkt. 139 at ¶ 39; NBC Dkt. 135 at ¶ 48.)

7 **III. STATEMENT OF FACTS**

8 **A. The Plaintiffs' Over-The-Air Programming.**

9 Plaintiffs own copyrights in certain television programs, which are transmitted
 10 over-the-air by local broadcast television stations. (SOF 1.) The FCC has licensed
 11 these stations the right to broadcast programming over the public airwaves. (SOF
 12 2.) The signals of these broadcast stations are then retransmitted by cable systems,
 13 satellite services and other multichannel video programming distributors
 14 ("MVPDs"). (SOF 3.)

15 **B. FilmOn X's Service.**

16 FilmOn X operates a website at www.filmon.com where users are (or were)
 17 able to access a wide variety of content, including original, licensed and over-the-air
 18 broadcast ("OTA" or "broadcast") programming. (SOF 4.)

19 In August 2012, FilmOn X launched a service using a remote mini-
 20 antenna/DVR technology, allowing users to access OTA programming via the
 21 Internet. (SOF 5.) It initially launched this service in Los Angeles and subsequently
 22 expanded its operations to New York, Chicago, Washington, D.C., Boston, Seattle,
 23 Dallas, San Francisco, Miami, Atlanta, Denver, Phoenix and Tampa. (SOF 6.)
 24 Customers were able to purchase subscriptions to local channel packages consisting
 25 of broadcast channels in a particular market depending upon the location of the
 26 subscriber. (SOF 7.)

1 FilmOn X's service provides several advantages to users. The service
2 provides users convenient access to OTA programming through the Internet without
3 requiring the purchase, installation and maintenance of an antenna. (SOF 8.)
4 FilmOn X's service is also much cheaper than the plans offered by other established
5 cable or satellite providers. FilmOn X offered local channel packages on either a
6 monthly or annual basis, which provide users with the ability to watch and record
7 certain broadcast channels from a particular market. (SOF 9.) In the past, FilmOn X
8 charged between about \$5.95 and \$19.95 for monthly local channel packages, and
9 between about \$59.95 and \$199.00 for annual local channel packages.³ (SOF 10.)

10 **C. FilmOn X's Facilities And Technology.**

11 As with other cable providers, FilmOn X's service operates by capturing
12 broadcast signals on the public airwaves and retransmitting those signals to
13 individual users. (SOF 13.) FilmOn X has physical facilities located in different
14 regions of the country where it houses antennas and other electronic equipment used
15 to capture, record and retransmit OTA programming via the Internet. (SOF 14.) The
16 antennas in these facilities received primary transmissions of OTA programming
17 made by network stations, such as KTTV Channel 11 in Los Angeles. (SOF 15.)
18 FilmOn X retransmitted this programming to individual users through secondary
19 retransmissions over the Internet. (SOF 16.)

20 In Los Angeles, FilmOn X initially created a "trailer" system behind FilmOn
21 X's corporate office in Beverly Hills. (SOF 17.) That facility featured an array of
22

23 ³ FilmOn X has experimented with its business model over time. During certain
24 time periods, it offered over-the-air channels in high definition for a free trial
25 period before the user was prompted to purchase a local channel package. (SOF
26 11.) At other times those channels were offered for free as part of FilmOn X's
27 Subscriber Activation Strategy, which was a marketing technique to get consumers
28 to try broadcast content for free in SD for a period of time, which would terminate
at some point. (SOF 12.)

1 antennas secured to the top of a trailer to capture broadcast signals transmitted over
2 the public airwaves. (SOF 18.) The signals from these antennas were carried via
3 electronic wiring to servers and other equipment inside the trailer that encoded, saved
4 and retransmitted unique copies of broadcast content to individual users over the
5 Internet. (SOF 19.) FilmOn X created similar trailer systems in New York, Miami
6 and Chicago. (SOF 20.)

7 Subsequently, FilmOn X transitioned from the trailer system to a “Lanner”
8 system. (SOF 21.) For the Lanner system, FilmOn X leased commercial space in
9 data centers in Los Angeles, New York, Chicago, Washington, D.C., Boston, Seattle,
10 Dallas-Ft. Worth, San Francisco, Atlanta, Denver, Phoenix and Tampa. (SOF 22.)

11 The trailer and Lanner systems both contained similar electronic equipment
12 needed to capture, store and retransmit local broadcast programming. (SOF 23.)
13 Both systems work roughly as follows:

14 First, when a subscriber wants to watch a show that is currently being
15 broadcast, he visits FilmOn X’s website and selects, from a list of the local
16 programming, the show he wishes to see. (SOF 24.)

17 Second, one of FilmOn X’s servers selects an antenna, which it dedicates to the
18 use of that subscriber (and that subscriber alone) for the duration of the selected
19 show. A server then tunes the antenna to the OTA broadcast carrying the show. The
20 antenna begins to receive the broadcast, and a FilmOn X transcoder translates the
21 signals received into data that can be transmitted over the Internet. (SOF 25.)

22 Third, rather than directly send the data to the subscriber, a server saves the
23 data in a subscriber-specific folder on FilmOn X’s hard drive. (SOF 26.)

24 Fourth, once several seconds of programming have been saved, FilmOn X’s
25 server begins to stream the saved copy of the show to the subscriber over the Internet.
26 The subscriber can watch the streamed program on the screen of his personal
27 computer, tablet, smart phone, Internet-connected television, or other Internet-

1 connected device. The streaming continues, a mere few seconds behind the OTA
2 broadcast, until the subscriber has received the entire show including the
3 commercials in the original broadcast. Alternatively, the subscriber may direct
4 FilmOn X to stream the program at a later time. (SOF 27.)

5 FilmOn X's system uses Internet Protocol technology to deliver OTA content
6 over the Internet. (SOF 28.) The video to be transmitted is converted to digital form
7 (if it is not already digital) and broken into smaller packets of data, each representing
8 parts of the original video. (SOF 29.) These packets are then transmitted across the
9 network to the receiving device (such as a set-top box, a laptop, a tablet) via coaxial
10 cables, fiber-optic cables, microwave links or any of the other communication
11 channels that make up the physical layer of the Internet. (SOF 30.) The device re-
12 assembles the stream by combining the packets in their proper order and then
13 displays it to the user. (SOF 31.) FilmOn X secures the URL used for streaming a
14 channel by including an encrypted key, which prevents unauthorized sharing or
15 copying of the stream. (SOF 36-37.)

16 **D. FilmOn X's Preparations To Recommence Retransmissions.**

17 At present, FilmOn X is not providing users with access to broadcast
18 programming due to preliminary injunctions entered by this Court and the District
19 Court for the District of Columbia. (SOF 38.) FilmOn X is prepared to recommence
20 retransmissions as a cable system with the approval of the courts in several
21 geographic markets, including Los Angeles, New York, Chicago, Dallas-Ft. Worth,
22 Boston, Miami-Ft. Lauderdale and Washington, D.C. (SOF 39.)

23 FilmOn X users will be required to purchase a local channel subscription
24 package in order to view OTA channels through FilmOn X's service. (SOF 40.)
25 Each subscription package will only include OTA broadcast channels within a
26 specific designated market area ("DMA"). (SOF 41.)

27 Since *Aereo* issued, FilmOn X has continued to work on improvements to its system
28

1 for the retransmission of OTA content over the Internet. (SOF 42.) First, FilmOn X
 2 has developed a more robust system to restrict retransmission of OTA content to
 3 viewing devices (e.g., televisions, computers and mobile phones) located within the
 4 DMA of the original broadcast. (SOF 43.) FilmOn X has adopted a conservative
 5 approach to DMA verification – the default is to deny a subscriber access to view the
 6 content of an OTA channel, unless there is a positive confirmation that (1) the user
 7 has a physical address based on a credit card check within the applicable DMA, and
 8 (2) the viewing device is located within the applicable DMA at the time of the
 9 retransmission. (*Id.*) FilmOn X also has developed a secure system that uses the
 10 HTTPS secure transmission protocol to provide end-to-end encryption (SOF 44),
 11 intends to engage a third party proxy detention service (SOF 45), intends to
 12 retransmit with closed captioning and without its logo (SOF 46), and likely will use a
 13 single master antenna. (SOF 47.)

14 **E. FilmOn X's Statements of Account And Royalty Payments.**

15 Shortly after the *Aereo* decision, on July 11, 2014, FilmOn X filed 14
 16 Statements of Account with the Copyright Office and made royalty payments
 17 relating to retransmissions of local broadcast stations. (SOF 48.)

18 On July 23, 2014, the Copyright Office sent a letter in which it accepted
 19 FilmOn X's documentation on a "provisional basis." (SOF 49.) It wrote:

20 According to established Copyright Office practice, the Office may
 21 accept FilmOn's SOA filings without comment; accept them
 22 provisionally, either taking no position or commenting upon any
 23 reservations we may have about the filing; or refuse the filings as not
 24 eligible under the compulsory license. See 43 Fed. Reg. 17962, 17963
 25 (May 19, 1988).

26 (*Id.*) The Copyright Office took the middle course, accepting FilmOn X's filings on
 27 a "provisional basis" in recognition of the fact that "the question of eligibility of
 28 internet-based retransmission services for the Section 111 license appears to have
 been raised again before the courts." (SOF 50-51.)

1 Subsequently, FilmOn X made additional royalty payments and filed
 2 additional paperwork with the Copyright Office in good faith compliance with the
 3 regulatory procedures. (SOF 52.) To date, FilmOn X has made royalty payments
 4 and filed Statements of Account for each of the six-month reporting periods between
 5 July 1, 2012, through the present in 14 different markets. (SOF 53.)

6 **F. The Notice of Proposed Rulemaking Issued By The Federal**
 7 **Communications Commission.**

8 Although the Copyright Office administers the Section 111 license under the
 9 Copyright Act, it has indicated that regulatory actions taken by the Federal
 10 Communications Commission may influence its treatment of the Statement of
 11 Accounts filed by FilmOn X. In its July 23, 2014 letter to FilmOn X, the Copyright
 12 Office wrote that “Section 111 is meant to encompass ‘localized retransmission
 13 services’ that are ‘regulated as cable systems by the FCC.’” (SOF 58.) In accepting
 14 FilmOn X’s filings on a provisional basis, it stated that “FilmOn should be aware
 15 that, depending upon further regulatory or judicial developments, and/or based upon
 16 the Office’s own further review of the issue, the Office may subsequently determine
 17 that it is appropriate to take definitive action on FilmOn’s filings” (*Id.*)

18 On December 17, 2014, the Federal Communications Commission (“FCC”)
 19 adopted a Notice of Proposed Rulemaking (the “NPRM”)⁴ in which it “propose[d] to
 20 update [its] rules to better reflect the fact that video services are being provided
 21 increasingly over the Internet.” (SOF 59.) It observed that “incumbent cable systems
 22 have made plain their intent to use a new transmission standard that will permit cable
 23 systems to deliver video via IP, and other innovative companies are also

24 ⁴ See *Promoting Innovation and Competition in the Provision of Multichannel*
 25 *Video Programming Services*, Notice of Proposed Rulemaking, MB Docket No.
 26 14-261 (rel. Dec. 19, 2014), available at
 27 <http://www.fcc.gov/document/commission-adopts-mvdpd-definition-nprm>, last
 28 accessed Mar. 19, 2015.

1 experimenting with new business models based on Internet distribution.” (SOF 61.)
2 In considering the definition of a multichannel video programming distributor
3 (“MVPD”) under the Communications Act, the FCC proposed “to interpret the term
4 MVPD to mean distributors of multiple linear video programming streams, including
5 Internet-based services.” (SOF 62.) It reasoned that “our proposed interpretation is
6 consistent with Congress’s intent to define ‘MVPD’ in a broad and technology-
7 neutral way to ensure that it would not only cover video providers using technologies
8 that existed in 1992, but rather be sufficiently flexible to cover providers using new
9 technologies such as Internet delivery.” (SOF 63.) The NPRM also discussed *Aereo*
10 and observed that the “Copyright Office might revisit” its treatment of *Aereo*’s
11 statements of account “if the Commission should find *Aereo* to be an MVPD under
12 the Communications Act.” (SOF 64.)

13 According to a notice-and-comment schedule set by the FCC, FilmOn X and
14 other commenters submitted their opening and reply comments to the NPRM on
15 March 3, 2015 and April 1, 2015, respectively. (SOF 66.) Additionally, FilmOn X
16 and other interested persons have been engaged in meetings with the FCC
17 commissioners and staff about the proposed rule change. (SOF 67.) Recently, in a
18 speech to the Media Institute on June 4, 2015, Gigi Sohn, counselor to FCC chairman
19 Tom Wheeler, stated:

20 I view this issue as a win-win-win for the incumbent MVPD and
21 broadcast industries, but most importantly, for consumers. Cable and
22 satellite companies that have their own linear over-the-top offerings
23 will benefit from the rights that being an MVPD confers. Similarly,
24 broadcasters will get another source of retransmission consent revenue
25 from those services that choose to carry broadcast stations. And new
26 business models that might emerge bring new alternatives to
27 consumers already adapting to how they view their programming.
28 (SOF 68.) Ms. Sohn indicated that it could be expected that the FCC would act on
the NPRM to reclassify some over-the-top video providers as MVPDs within the
next 19 months. (SOF 69.)

1 *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 593 F. Supp. 808, 813 (D. Minn.
 2 1984) (internal citations omitted). These amendments were intended to balance
 3 “two divergent national policies. On the one hand, Congress wished to expand the
 4 public’s access to diverse programming by encouraging development of the cable
 5 TV industry. On the other hand, Congress clearly sought to protect local
 6 broadcasters and . . . reward[] the creators of copyrighted works.” *Id.* (internal
 7 citations omitted).

8 Specifically, Congress created Section 111 “to regulate cable companies’
 9 public performances of copyrighted works.” *Aereo*, 134 S.Ct. at 2506. Section 111
 10 creates a **statutory copyright license** conveyed by operation of law that “permits
 11 cable systems to retransmit distant broadcast signals without securing permission
 12 from the copyright owner and, in turn, requires each system to pay royalty fees to a
 13 central fund based on a percentage of its gross revenues.” *Capital Cities Cable, Inc.*
 14 *v. Crisp*, 467 U.S. 691, 709 (1984). As a result, cable systems are able to
 15 “retransmit to [their] customers any primary transmissions made by a broadcast
 16 station licensed by the [FCC].” *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n*
 17 *of Am., Inc.*, 836 F.2d 599, 602-03 (D.C. Cir. 1988). “In exchange for this privilege,
 18 however, the cable systems are required to pay a fee, to be distributed to the
 19 copyright owners as surrogate for the royalties for which they might have negotiated
 20 under a pure market scheme.” *Id.*; see also *Nat’l Broad. Co. v. Copyright Royalty*
 21 *Tribunal*, 848 F.2d 1289, 1291 (D.C. Cir. 1988).

22 V. ARGUMENT

23 A. **FilmOn X Meets The Statutory Definition Of A “Cable System” Under** 24 **The Copyright Act.**

25 “[C]ourts must give effect to the clear meaning of statutes as written.” *Est. of*
 26 *Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). The court “must analyze
 27 the statutory provision in question in the context of the governing statute as a whole,
 28 presuming congressional intent to create a coherent regulatory scheme.” *Padash v.*

1 *I.N.S.*, 358 F.3d 1161, 1170-71 (9th Cir. 2004). It must make “every effort not to
 2 interpret the provision at issue in a manner that renders other provisions of the same
 3 statute inconsistent, meaningless or superfluous.” *Children’s Hosp. & Health Ctr. v.*
 4 *Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999) (internal quotations omitted). “[W]hen
 5 the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial
 6 inquiry is complete.’” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54
 7 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *U.S. v. Ron Pair*
 8 *Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (same). If the statutory language is
 9 ambiguous, the court looks to the canons of statutory construction and the legislative
 10 history to determine Congress’ intent. *Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192,
 11 1196 (9th Cir 2013.)

12 In this case, the statutory definition of a cable system is plain. FilmOn X fits
 13 squarely within this definition, which broadly applies to any entity with facilities in
 14 any state that receives primary transmissions from broadcast stations licensed by the
 15 FCC and retransmits those signals to its customers. The *Aereo* decision and the
 16 legislative history confirm this common-sense reading of the statute.

17 **1. A Section 111(f) “Cable System” Plainly Includes Internet-Based**
 18 **Retransmission Services.**

19 Based on the plain statutory language, this Court should find that FilmOn X is
 20 a cable system under the Copyright Act. Section 111(f) broadly defines a “cable
 21 system” to include three elements, as follows:

22 [1] a facility, located in any State, Territory, Trust Territory, or
 23 Possession, that [2] in whole or in part receives signals transmitted or
 24 programs broadcast by one or more television broadcast stations
 25 licensed by the Federal Communications Commission, and [3] makes
 secondary transmissions⁵ of such signals or programs by wires, cables,

26 ⁵ Section 101 states that “to ‘transmit’ a performance or display is to
 27 communicate it by *any device or process* whereby images or sounds are received
 28 (footnote continued)

1 microwave, or other communications channels to subscribing
2 members of the public who pay for such service.

3 17 U.S.C. § 111(f)(3).

4 The statute is completely indifferent as to the mode of retransmission
5 technology. A broadcast retransmitter can qualify as a “cable system” regardless of
6 the type of communications channels it chooses to use. Congress’ open-ended
7 definition of a “cable system” to include “other communications channels”
8 demonstrates a clear intent that the Act be construed to accommodate evolving
9 technologies. *See WGN Continental Broadcasting v. United Video, Inc.*, 693 F.2d
10 622, 627 (7th Cir. 1982) (“Congress probably wanted the courts to interpret the
11 definitional provisions of the new act flexibly, so that it would cover new
12 technologies as they appeared, rather than to interpret those provisions narrowly and
13 so force Congress periodically to update the Act”). In light of the broad and
14 technology agnostic language used in Section 111 and the Copyright Act as a whole,
15 it would be improper and unwise to force Congress to amend the Act every time a
16 new broadcast retransmission technology was adopted by Section 111 retransmitters.

17 FilmOn X meets each cable system definitional element. FilmOn X has
18 physical facilities located in various states (SOF 6.), where it receives primary
19 transmissions in the form of over-the-air signals transmitted by one or more
20 television broadcast stations licensed by the FCC. (SOF 13-15.) FilmOn X then
21 makes secondary transmissions of those signals by wires, cables or other
22 communications channels to subscribing members of the public who pay for such
23 service. (SOF 16, 24-32.) Indeed, the Networks’ own expert conceded that video

24 _____
25 beyond the place from which they are sent.” 17 U.S.C. § 101 (emphasis added).
26 Thus, the technology agnostic “any device or process” language is not limited to
27 the Transmit Clause, but applies to the Copyright Act as a whole including the
28 compulsory licensing scheme.

1 content delivered over the Internet travels over coaxial cables, fiber-optic cables,
 2 microwave links and other communication channels that make up the physical layer
 3 of the Internet. (SOF 32.) In considering Aereo's similar architecture, Justice
 4 Sotomayor stated, "I look at the definition of a cable company, and it seems to fit."
 5 See Transcript of Oral Argument at 4:1-13, *Aereo*, 134 S.Ct. 2498 (2014) (No. 13-
 6 461).

7 **2. The Supreme Court's *Aereo* Reasoning Should Guide This Court's** 8 **Analysis.**

9 The Supreme Court based its decision that Aereo publicly performs on the
 10 finding that Aereo is "substantially similar to" and "is for all practical purposes a
 11 traditional cable system[.]" *Aereo*, 134 S.Ct. at 2506-07. Throughout the opinion,
 12 the Court focused on the nature of services offered by Aereo and concluded that
 13 minor technological differences between Aereo's mini-antenna/DVR technology and
 14 the system used by CATV companies in the past were immaterial. It wrote that "the
 15 behind-the-scenes way in which Aereo delivers television programming to its
 16 viewers' screens" does not render "Aereo's commercial objective any different than
 17 that of cable companies. Nor do they significantly alter the viewing experience of
 18 Aereo's subscribers." *Id.* at 2508. In adopting a technology agnostic interpretation
 19 of the Copyright Act, the Court reasoned that Aereo's internet-based retransmission
 20 service still performs the same basic function as a CATV system. *See id.* at 2507
 21 (comparing "a click on a website" to a "turn of the knob" on a television set—both
 22 of which allow a subscriber to watch broadcast programming).

23 Importantly, in reaching its decision, the Supreme Court found that Aereo's
 24 activities were meant to be reached by the entire Act, including the 1976
 25 amendments to address *Fortnightly* and *Teleprompter*. *Id.* at 2511 ("In sum, having
 26 considered the details of Aereo's practices, we find them highly similar to those of
 27 the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that
 28 the **1976 amendments** sought to bring within the scope of the **Copyright Act**.")

1 (Emphasis added).

2 Moreover, the *Aereo* transcript reflects the Court's inclination to find
3 companies like Aereo are entitled to a Section 111 license. At oral argument, Justice
4 Sotomayor, who joined in the majority opinion, specifically suggested that Aereo is
5 entitled to a Section 111 license as a cable system. In discussing the plain language
6 of Section 111, the following colloquy took place between Justice Sotomayor and
7 counsel for the plaintiff-networks (many of whom are plaintiffs in this case):

8 JUSTICE SOTOMAYOR: . . . But I look at the definition of a
9 cable company, and it seems to fit

10 * * *

11 . . . Makes secondary transmissions by wires, cables, or other
12 communication channels. It seems to me that a little antenna with a
13 dime fits that definition. To subscribing members of the public who
14 pay for such service. I mean, I read it and I say, why aren't they a
15 cable company?

16 MR. CLEMENT: . . . I think if you're [] already at that point, you've
17 probably understood that just like a cable company, they're public—
18 they're publicly performing and maybe they qualify as a cable
19 company and maybe they could qualify for the compulsory license
20 that's available to cable companies under Section 111 of the statute.

21 JUSTICE SOTOMAYOR: But it just gets it mixed up. Do we
22 have to go to all of those other questions if we find that they're a cable
23 company? *We say they're a c[able] company, they get the compulsory*
24 *license.*

25 RJN, Ex. 5 (*Aereo* S. Ct. Hrg. Tr. at 4:1–5:4 (emphasis added)). Similarly, Justice
26 Breyer, who authored the majority opinion, expressed concern about “tak[ing] [an
27 internet-based service] out of the compulsory licensing system” because it would
28 limit the public's access to copyrighted material. *Id.* at 53:21–54:5.

1 **3. Legislative History Confirms Congress Intended A Broad and**
 2 **Technology Agnostic Interpretation of Section 111.**

3 Legislative history confirms that Congress drafted the definition of a “cable
 4 system” in purposefully broad and flexible language that would not become outdated
 5 with advancements in technology delivery systems.

6 During subcommittee hearings on the proposed amendments to the Copyright
 7 Act, the former Register of Copyrights, Barbara Ringer, testified that Section 111
 8 “deals with all kinds of secondary transmissions, which usually means picking up
 9 electrical energy signals, broadcast signals, off the air and retransmitting them
 10 simultaneously by one means or the other—usually cable but sometimes other
 11 communication channels, like microwave and apparently laser beam transmissions
 12 that are on the drawing board if not in actual operation.” RJN, Ex. 14 (Hearings on
 13 H.R. 2223 before the Subcomm. on Courts, Civil Liberties, and the Admin. of
 14 Justice of the Comm. On the Judiciary House of Representatives, 94th Cong., 1st
 15 Session 1820 (1975) (hereinafter “H.R. 2223 Hearings”), at p. 1820); *see also* RJN
 16 Ex. 15 (H.R. 2223 Hearings at 442 (“the technology is so rapidly changing that we
 17 cannot really foresee what kind of changes in technology will occur”) (statement of
 18 Rep. Pattison addressing Ashton R. Hardy of the FCC)).

19 In 1994, with the passage of the Satellite Home Viewer Act, Congress again
 20 demonstrated its intent that Section 111 be interpreted broadly to new emerging
 21 technologies when it amended the statutory definition of a cable system to
 22 “overturn[] an erroneous interpretation of the definition of ‘cable system’ by the
 23 Copyright Office, an interpretation which denied the license to microwave carriers.”
 24 RJN, Ex. 9 (H.R. Rep. 103-703, at 7). In so doing, Congress emphasized that its
 25 amendment to section 111(f) was a *clarification* of the scope of the definition, not a
 26 change in current law:

27 The proposed legislation amends the definition of the term “cable
 28 system” contained in section 111(f) *to clarify* that the cable
 compulsory license applies not only to traditional wired cable

1 television systems, but also to multichannel multipoint distribution
2 service systems, also known as “wireless” cable systems.

3 RJN, Ex. 10 (S. Rep. 103-407, at 14). Congress’s intent was to overrule a decision
4 of the Copyright Office and to place “wireless cable” on a competitive footing with
5 wired cable for purposes of the compulsory license by adding the phrase “or
6 microwave” to the statutory text. RJN, Ex. 10 (S. Rep. 103-407, at 14).

7 In 1994, the Copyright Office amended its regulations in response to Congress
8 and set forth the eligibility of “wireless cable” for the Section 111 compulsory
9 license. *Cable Compulsory License; Definition of a Cable System*; 59 FR 67635-01
10 (rel. Dec. 30, 1994). Significantly, given that the 1994 amendment was a
11 “clarification” of current law, the Copyright Office recognized its retroactive effect,
12 declaring that it “will treat ‘wireless’ cable operators as being eligible for the cable
13 compulsory license since January 1, 1978, the effective date of the Copyright Act
14 and section 111.” *Id.* This was the case even though such wireless systems
15 generally served subscribers “without using any public right-of-way” and thus fell
16 within an exception to the Communications Act’s definition of “cable system” under
17 Section 522. Section 111 must be interpreted broadly in this case, as well.

18 **4. *Ivi* Is Not Controlling And Was Wrongly Decided, In Any Event.**

19 In *WPIX, Inc. v. ivi, Inc.* (“*ivi*”), 691 F.3d 275 (2012), the Second Circuit
20 affirmed a preliminary injunction against a service streaming copyrighted television
21 programming over the Internet and found that the service was not likely to prevail on
22 its Section 111 defense. *Id.* at 284. But the Second Circuit’s conclusion that an
23 Internet-based retransmission service cannot be a cable system misconstrues the
24 plain language of the Copyright Act and its legislative history. Moreover, *ivi* does
25 not control this case.
26
27
28

a. Ivi Is Not Binding On This Court, And Aereo Casts Its Validity Into Doubt.

Although the Supreme Court did not explicitly overrule *ivi*, its reasoning in *Aereo* effectively abrogates the holding.⁶ In *ivi*, the district court rejected *ivi*'s Section 111 defense on the ground that "*ivi*'s [technical] architecture bears no resemblance to the cable systems of the 1970s." See *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 604 (S.D.N.Y. 2011). The Second Circuit endorsed the district court's technology-centric interpretation of the Copyright Act,⁷ reasoning that Congress would have amended the Act to explicitly include "the 'Internet' as an acceptable communication channel under § 111" if it had intended Section 111 to cover secondary transmissions over the Internet. *ivi*, 691 F.3d at 282. However, the Supreme Court's decision in *Aereo* rejects this technology-specific interpretative approach, reasoning that the "behind-the-scenes way in which Aereo delivers television programming to its viewers' screens" does not Aereo any less like a cable system. See *Aereo*, 134 S.Ct. at 2508-09. Indeed, the Supreme Court's reasoning, as well as the legislative history, clearly suggests that an Internet-based retransmission service fits within a plain reading of the definition of a cable system under Section 111(f).

Moreover, *ivi* is factually distinguishable. Unlike in this case, *ivi* did not identify a facility "located in any State, Territory, Trust Territory, or Possession" as

⁶ A case may be called into doubt by subsequent precedent even where that precedent does explicitly overrule the earlier case. See, e.g., *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003); *United States v. James*, 712 F.3d 79, 94 (2d Cir. 2013).

⁷ The Second Circuit also adopted a technology-specific interpretation of the Transmit clause and the definition of a public performance in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121 (2d Cir. 2008) ("*Cablevision*") and *Aereo*.

1 required by the Section 111(f) definition of a cable system. *See ivi*, 691 F.3d at 280,
 2 n. 6. In the absence of a physical facility (like FilmOn X's facilities), the Second
 3 Circuit opined that it is "unclear whether the Internet itself is a facility, as it is
 4 neither a physical nor a tangible entity; rather, it is a global network of millions of
 5 interconnected computers." *Id.* at 280 (internal quotations omitted). In doing so, the
 6 Second Circuit misapplied the plain language of the statute by confusing the
 7 "communication channel" (*i.e.*, the Internet) for the "facility" (*i.e.*, the physical
 8 location where broadcast signals are received and retransmitted). Here, the record
 9 shows that FilmOn X does not exist only in the metaphorical cloud, but maintained
 10 physical facilities in more than a dozen cities around the country. (SOF 6, 14, 17,
 11 20, 22.) Thus, unlike *ivi*, FilmOn X had actual facilities, as required by Section 111.

12 **b. The Second Circuit Placed Undue Weight On Copyright**
 13 **Office Statements And Policy Recommendations.**

14 Invoking the *Chevron* doctrine, the *ivi* court also placed undue reliance on
 15 inapposite and unpersuasive statements made by the Copyright Office. Under this
 16 doctrine, a court is obliged to first enforce the plain and unambiguous meaning of a
 17 statute, regardless of any agency interpretation of the statute. *Chevron, U.S.A., Inc.*
 18 *v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984); *Est. of Cowart*, 505 U.S. at 476 ("a
 19 reviewing court should not defer to an agency position which is contrary to an intent
 20 of Congress expressed in unambiguous terms."). If the court determines that the
 21 statute is ambiguous, then the court may consider the agency interpretations of the
 22 statute. *Chevron*, 467 U.S. at 843; *United States v. Mead Corp.*, 533 U.S. 218, 219
 23 (2001) ("the overwhelming number of cases applying *Chevron* deference have
 24 reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

25 Even assuming Section 111 is ambiguous (it is not), the Copyright Office has
 26 not issued any rule or regulation after a formal notice-and-comment period on
 27 whether internet-based retransmission services are eligible for a Section 111 license.

1 “Interpretations such as those in opinion letters—like interpretations contained in
 2 policy statements, agency manuals, and enforcement guidelines, all of which lack
 3 the force of law—do not warrant *Chevron*-style deference.” *Christensen v. Harris*
 4 *County*, 529 U.S. 576, 687 (2000). “Instead, interpretations contained in formats
 5 such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore v.*
 6 *Swift & Co.*, 323 U.S. 134, 140 [] (1944), but only to the extent that those
 7 interpretations have the ‘power to persuade[.]’” Accordingly, opinions expressed by
 8 the Copyright Office in policy documents are not entitled to *Chevron* deference. *See*
 9 *Christensen*, 529 U.S. at 587.

10 Moreover, consistent with its custom and practice,⁸ the Copyright Office has
 11 not made a factual determination as to whether FilmOn X is entitled to a Section 111
 12 license. Instead of definitively accepting or rejecting the statements of account
 13 submitted by FilmOn X, the Copyright Office adopted a “wait-and-see approach.” It
 14 accepted FilmOn X’s submissions on a “provisional basis,” reviewed the
 15 submissions for obvious errors and omissions, and noted that pending litigation in
 16 the courts and regulatory proceedings before the FCC might resolve the dispute or
 17 lead to further action by the Copyright Office. (SOF 50.)

18 At present, the FCC is poised to take action to classify certain Internet-based
 19 services as MVPDs, which likely would bring FilmOn X’s subscription-based
 20 service within the scope of the Communications Act. With the advent of high-
 21 capacity internet access, the technology available to deliver live video programming
 22 to consumers has expanded to include internet-based video transmission. (SOF 33.)
 23 Today, several cable systems, including Comcast Cable, AT&T U-Verse and
 24

25
 26 ⁸ See 42 Fed. Reg. 15065, 15067 (Mar. 18, 1977) (stating that “[f]actual or
 27 other determinations as to the application of this definition to any particular
 28 activity or facility are beyond the province of the Copyright Office”).

1 Verizon FiOS,⁹ use Internet Protocol technology to deliver local broadcast
 2 programming. (SOF 34.) The FCC has wisely recognized that “nascent, Internet-
 3 based video programming services [should] have access to the tools they need to
 4 compete with established providers.” (SOF 60.) In light of these technological and
 5 regulatory developments, it would be unwise for this Court to rule that Internet-
 6 based services are not entitled to a Section 111 license. Instead, this Court should
 7 recognize that FilmOn X has the same statutory rights as other established cable
 8 providers.

9 **B. FilmOn X Meets All The Other Statutory Requirements For A Section**
 10 **111 License.**

11 Under the Copyright Act, a cable system – like FilmOn X – is entitled to a
 12 statutory copyright license to retransmit broadcast programming. Section 111(c)(1)
 13 provides that “secondary transmissions to the public by a cable system” of broadcast
 14 programming “shall be subject to statutory licensing upon compliance with the
 15 requirements of subsection (d) where the carriage of the signals comprising the
 16 secondary transmission is permissible under the rules, regulations, or authorizations
 17 of the Federal Communications Commission.” 17 U.S.C. § 111(c)(1). FilmOn X
 18 has complied in good faith with the statutory procedures set forth in Section 111(d),
 19 and FilmOn X’s retransmissions of broadcast programming are permissible under
 20 FCC rules and regulations.

21 **1. FilmOn X Has Made Royalty Payments And Has Otherwise**
 22 **Complied In Good Faith With Subsection (d).**

23 FilmOn X has taken all appropriate steps to file the necessary paperwork to
 24 comply with the rules and regulations established by the Copyright Office for the

25 ⁹ Notably, only a couple of years ago, the Copyright Office recognized that
 26 AT&T U-Verse and Verizon FiOS – both of which use Internet protocol
 27 technology to deliver video content⁹ – are entitled to a Section 111 license. (SOF
 28 34.)

1 Section 111 program. Section 111(d)(1) directs that cable systems deposit their
 2 compulsory license royalty fees with the Register of Copyrights, “in accordance with
 3 requirements that the Register shall prescribe by regulation” 17 U.S.C. §
 4 111(d)(1). The Copyright Office has prescribed rules pertaining to “the fees for . . .
 5 services performed by the Licensing Division” (37 C.F.R. § 201.3), “the verification
 6 of a Statement of Account and royalty fees” (37 C.F.R. § 201.16), and “the deposit
 7 of Statements of Account and royalty fees.” 37 C.F.R. § 201.17.

8 In good faith compliance with Section 111(d)(1), FilmOn X has submitted
 9 Statements of Account and made the appropriate royalty and filing payments to the
 10 Copyright Office for the time period spanning from the launch of its mini-
 11 antenna/DVR service in August 2012 to the present. (SOF 54.) In particular,
 12 FilmOn X has submitted Statements of Account for up to fourteen markets covering
 13 5 different reporting periods for each city in which it operated, including Los
 14 Angeles. (SOF 55.) It also has supplemented and corrected these filings where it
 15 discovered errors and omissions. (SOF 56.) The Copyright Office has accepted
 16 these filings on a provisional basis. (SOF 57.) Accordingly, FilmOn X has
 17 complied in good faith with Subsection (d).

18 **2. FilmOn X’s Transmissions Were, And Are, “Permissible” Under**
 19 **FCC Rules And Regulations.**

20 **a. FilmOn X’s Secondary Transmissions Are “Permissible” So**
 21 **Long As They Are Not Prohibited By The FCC.**

22 Under Section 111(c)(1), a cable system’s secondary transmissions must be
 23 “permissible under the rules, regulations, or authorizations of the Federal
 24 Communications Commission.” 17 U.S.C. § 111(c)(1). To date, the FCC has
 25 expressly rejected any regulatory oversight of the transmission of television signals
 26 over the Internet, as a matter of policy and in its adversarial decisions. RJN, Ex. 7
 27 (*In re Sky Angel*, 25 FCC Rcd. 3879, at ¶ 10 (Media Bur. 2010)).

1 It is well settled that where a regulatory scheme does not prohibit a particular
 2 action, that action is, as a matter of logic and legal construction, “permissible” under
 3 that regulatory scheme. *Ventura Broad. Co. v. FCC*, 765 F.2d 184, 194 (D.C. Cir.
 4 1985) (FCC decisions which are not prohibited by statute are permissible); *see also*
 5 *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 514 (9th Cir.
 6 2013) (where the EPA had chosen not to regulate storm-water runoff from the
 7 defendants’ utility poles, that runoff was in compliance with the Clean Water Act,
 8 even if it was discharged without a permit required by the EPA).

9 This issue has been addressed specifically in the context of Section 111 and
 10 the question of what is “permissible” under FCC regulations. In 1991, prior to
 11 Congress’ adoption of Section 119 of the Copyright Act, which enacted a
 12 compulsory license scheme for satellite television providers, NBC sued Satellite
 13 Broadcasting Networks for copyright infringement based on the fact that the
 14 company transmitted NBC’s signals through its satellite system. *Nat’l Broad. Co.,*
 15 *Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1468 (11th Cir. 1991),
 16 *superseded on different grounds by regulation*, 37 C.F.R. § 201.17(k), as recognized
 17 by *Satellite Broad. & Commc’ns Ass’n of Am. v. Oman*, 17 F.3d 344 (11th Cir.
 18 2011). In that case, the defendant asserted a compulsory license under Section 111
 19 and asserted that it was in compliance with FCC regulations because the FCC had
 20 chosen not to regulate satellite television transmissions. *Id.* NBC objected, arguing
 21 that, even if the FCC did not regulate satellite transmissions, the satellite
 22 transmission were not “permissible” unless the FCC affirmatively approved of them
 23 under its regulations. *Id.* at 1471. The Eleventh Circuit rejected
 24 the argument, noting that “[a] minor issue that remains is that § 111(c)(1) gives SBN
 25 rebroadcast rights only if that rebroadcast was “permissible under the rules,
 26 regulations, or authorizations” of the FCC. ***The short answer is that the rebroadcast***
 27 ***was permissible because no rule or regulation forbade it.*** *Id.* (emphasis added)
 28

1 (further stating that “to require express approval of the FCC would be to reach a
2 result from the FCC’s inaction that the FCC unequivocally does not intend”).
3 Because FilmOn X’s secondary transmissions over the Internet did not and do not
4 violate FCC rules and regulations, those transmissions are permissible.

5 **b. FilmOn X Is Prepared To Comply With FCC Rules And**
6 **Regulations.**

7 The FCC is considering rule changes that would treat certain Internet-based
8 services as MVPDs. FilmOn X is prepared to comply with any new FCC rules and
9 regulations, as well as any orders of this Court that might impose conditions or
10 restrictions on the receipt of a Section 111 license.

11 In particular, FilmOn X has designed a more refined geolocation-based
12 system that reliably limits retransmissions of broadcast programming on a DMA-
13 basis. (*See* SOF 43.) While nothing in the text of the Copyright Act requires that a
14 cable system limit secondary transmissions of broadcast programming on a localized
15 basis, FilmOnX is prepared to limit broadcast programming retransmissions to
16 viewers located within a particular DMA. (*See Id.*) It also will limit its
17 retransmissions of broadcast programming to subscribers who paid for a monthly or
18 annual subscription plan. (*See* SOF 40-41.) Additionally, FilmOn X has already
19 designed other technical improvements to its system, which, among other things,
20 anticipate common regulatory issues such as closed captioning, encryption methods
21 and content protection. (*See* SOF 44-46.)

22 **VI. CONCLUSION**

23 For the foregoing reasons, this Court should grant summary judgment in
24 favor of FilmOn X on its Section 111 affirmative defense and dismiss this action
25 with prejudice. It should further declare that FilmOn X is entitled to a Section 111
26 license based on FilmOn X’s counterclaim for declaratory relief.
27
28

1 June 18, 2015

Respectfully submitted,

2
3 By: /s/ Ryan G. Baker

4 Ryan G. Baker

BAKER MARQUART LLP

10990 Wilshire Blvd., Fourth Floor

Los Angeles, California 90024

6
7 Attorneys for Defendants and
Counterclaimants